No. 93-1170

In The
Supreme Court of the United States
October Term, 1994

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* PETER BOLLEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

This brief is filed on behalf of Peter Bollen, a veteran Post Office employee whose plight illustrates the unmitigated unfairness of the Ethics Reform Act of 1989 ("Reform Act"). As stated in the affidavits attached to this brief, Mr. Bollen has worked as a clerk for the United States Postal Service in Lynnfield, Massachusetts for over twenty years. While off duty, he has written and sold a number of non-fiction works. Mr. Bollen has received several thousand dollars for writing two books and a few hundred dollars for some articles. For the past four years, however, he has stopped writing such articles for fear of the $10,000 fine and possible

discipline he would suffer for receiving compensation, no matter how small, for such writing.

Because of the impact of the Reform Act, Mr. Bollen had to abandon plans to publish a review of a Frederick Douglass biography. In early 1991, Mr. Bollen decided to write and sell a review of the book during the Black History Month of 1991. Of course, since the demand for the review has obviously greatly diminished because of the passage of time, he has abandoned his plans to critique that book.

Mr. Bollen has also delayed writing an article on a 104-year-old journalist. The journalist has covered every major war of the 20th Century and has written over twenty books. In order to do a responsible job, Mr. Bollen would have to incur costs; he would have to travel to Vermont to interview the journalist and purchase several of his out-of-print books. Because of his limited resources, Mr. Bollen has delayed writing this article despite the obvious risk of delaying an interview with a centenarian.

In December 1990, Mr. Bollen brought an action in the District of Massachusetts claiming that the Reform Act violated his First Amendment rights. Bollen v. United States, C.A. No. 90-13049. The District Court dismissed the claim without prejudice on June 5, 1992 because of the D.C. Circuit action. Mr. Bollen appealed this dismissal to the First Circuit. Bollen v. United States, C.A. No. 92-1965. On September 10, 1992, the court stayed Mr. Bollen's appeal pending the resolution of this action. Mr. Bollen is not a member of the National Treasury Employees Union.

Pursuant to Supreme Court Rule 37.3, Mr. Bollen's counsel, New England Legal Foundation has obtained written consent for the filing of this amicus brief from counsel for the Petitioner and Respondent. Copies of the consents are being filed with this brief.

STATEMENT OF THE CASE

Amicus accepts and adopts the Respondent National Treasury Employees Union's Statement of the Case.

SUMMARY OF ARGUMENT

Amicus Curiae's brief makes three points. First, the Reform Act is unconstitutional as a content-based restriction because it prohibits receipt of compensation for non-fiction articles while permitting such payments for most other writings including fiction. Second, the Government has failed to meet its burden of proving that its interest outweighs those of affected federal employees. There is no significant government interest in prohibiting receipt of compensation for non-fiction articles written by lower level executive branch employees which outweighs the severe burden the Act places on those employees' First Amendment rights. Third, to the extent that the Reform Act furthers legitimate government interests in prohibiting federal employees from receiving such compensation, those interests are already adequately protected by existing laws.

ARGUMENT

I. PROHIBITING RECEIPT OF COMPENSATION FOR WRITING VIOLATES THE FIRST AMENDMENT FREEDOM OF EXPRESSION.

The Ethics Reform Act of 1989 prohibits practically all federal employees from receiving compensation for certain writings and speeches. 5 U.S.C. app. § 501(b) (1992). "Honorarium" is defined as a "payment of money or any thing of value for an appearance, speech or article . . . ." 5 U.S.C. app. § 505(3) (1992). Regulations adopted by the Office of Government Ethics, however, exclude numerous types of appearances, speeches and articles from the definition of these terms. 5 C.F.R. § 2636.203(b), (c) & (d) (1992). An "article" means "a writing, other than a book or a chapter of a book, which has been or is intended to be published or republished in a journal, newspaper, magazine or similar collection of writings." 5 C.F.R. § 2636.203(d) (1992). "The term does not include works of fiction, poetry, lyrics, or script." Id Individuals who violate the ban on honoraria are subject to fines of up to $10,000 and disciplinary or corrective action, including termination. 5 U.S.C. app. § 504(a) (1992); 5 C.F.R. § 2636.104(a)

& (b) (1992).

Plainly the honorarium ban in the Reform Act is a content-based restriction on speech. For that reason, and because it fails the test announced in Pickering v. Board of Education, 391 U.S. 563 (1968), it violates the First Amendment.

A. *The Ethics Reform Act Is An Unconstitutional Content-Based Regulation.*

Much like the law that was struck down in Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221 (1987), the Reform Act is content-based. In Arkansas Writers Project, the statute imposed a tax on sales of personal property including general interest magazines. Id. at 224. Such magazines could contain articles on a variety of subjects, such as, sports or religion. Id. The law, however, exempted religious, professional, trade and sports journals. Id.

The ban on honoraria applies to an extremely narrow group of writings: non-fiction articles. "Non-fiction" is of course short-hand for articles concerning such topics as sports, news, entertainment or politics. On the other hand, the Act permits receipt of compensation for a broad range of writings, including plays, poetry and fiction.[1] Thus, the Reform Act, like the Arkansas statute, draws distinctions based on content and, no matter how well intentioned, creates absurd results. Mr. Bollen, for example, could have written and been paid for writing a play concerning Frederick Douglass, but he could not legally be paid for writing a review of

[1]Although Amicus does not suggest that this Court has or should create a hierarchy of First Amendment protection based on the content of speech, if there were such a hierarchy, non-fiction and political commentary would surely be at its apex. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 786-87 (2d ed. 1988) (discussion of Professor Meiklejohn's theory). Such speech deserves the greatest First Amendment protection, exactly the opposite of the result under the Reform Act.

such a play.[2]

Content-based regulations are presumptively unconstitutional. As this Court held, "[a]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject, or, its content." Arkansas Writers Project, 481 U.S. at 230 (citation omitted). More precisely, "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S.Ct. 501, 508 (1991). Accord Arkansas Writers' Project, 481 U.S. at 230. The image of a government censor categorizing the content of Peter Bollen's writing in order to determine whether to impose a $10,000 fine is a direct affront to the First Amendment.

B. *Under The Pickering Test, The Reform Act Is Unconstitutional.*

As the court below held, because this case "involves a government burden on the speech of its own employees, Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), supplies the standard for judicial review of the congressional action." National Treasury Employees Union v. United States, 990 F.2d 1271, 1272 (D.C. Cir. 1993). Under Pickering, the court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern" against "the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Cases subsequent to Pickering have used various terms to describe the Government's burden of proof. See, e.g., Waters v. Churchill, 62 U.S.L.W. 4397, 4401 (1994) ("the government may have to make a substantial showing that the

[2]Not only does the sweep of the ban lack logic, it also lacks clarity. For example, would a satiric poem discussing current events be licit poetry or illicit political commentary?

speech is, in fact, likely to be disruptive before it may be punished"); Rutan v. Republican Party of Illinois, 497 U.S. 62, 69-70 & n. 4 (1990) (plurality opinion) (the regulation must be the "least restrictive means" to further the Government interest); Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) ("the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'"). However, whatever form of words is used, the Reform Act is unconstitutional. See National Treasury Employees Union, 990 F.2d at 1275 (finding that the Reform Act is unconstitutional under "even the most lenient" burden of proof).

1. *The Government's Interest In Prohibiting Compensation For Writing By Lower Level Executive Branch Employees Is Minimal.*

Of course, the Government has an interest in "protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety . . . ." National Treasury Employees Union, 990 F.2d at 1274. As the Court of Appeals held, this interest is strong enough to outweigh employees' First Amendment rights only in cases where the compensation for writing actually creates an appearance of impropriety. Id. As Mr. Bollen's case shows, there is no appearance of impropriety in the vast majority of situations to which the Reform Act applies. The Government has failed to identify any conceivable nexus between a lower level executive branch employee's job and "either the subject matter of the expression or the character of the payor." Id. at 1275. There has been no suggestion that newspapers, which would pay Mr. Bollen for a book review, have a relationship with the Post Office "that would make them wish to curry its favor." Id.

Such a nexus, however, might exist between honorarium payors and Senators, federal judges, senior executive branch employees and Congressmen and Congresswomen. The legislative history shows that that nexus was the concern of both Houses. See

National Treasury Employees Union, 990 F.2d at 1278 ("the floor debates indicate that Congress was principally concerned that the receipt of honoraria by members of Congress created the appearance of influence-buying"). See also 135 Cong. Rec. H8732-03, H8766 (daily ed. Nov. 16, 1989) (statement of Representative Wolpe) ("a pay adjustment provision tied directly to the elimination of all honoraria or speaking fees"); 137 Cong. Rec. S10254-01, S10267 (daily ed. July 17, 1991) (statement of Senator Stevens) ("It is to me just a matter of simple justice that we now eliminate honoraria and equalize [House of Representatives and Senate] salaries."). In fact, the Senate Majority leader mistakenly thought that the Reform Act did not even apply to lower level executive branch employees. See 135 Cong. Rec. S15966-02, S15987 (daily ed. Nov. 17, 1989) (statement of Senator Mitchell) (the bill was a "complete ban on honoraria not only for [Members] but for the Federal judiciary and for senior executives in the executive branch of government.") (emphasis added). The legislative rationale for the Reform Act supports an honoraria ban on Senators, Members of the House of Representative, senior executive branch employees and federal judges. However, it clearly does not support an honoraria ban on lower level executive branch employees.

The impetus for the Reform Act certainly was not a fear of "abuses" by lower level executive branch employees such as Mr. Bollen. No reasonable person could argue with a straight face that a Lynnfield, Massachusetts postal clerk's receipt of a few hundred dollars for writing a review of a biography of an abolitionist creates even the slightest appearance of impropriety and/or diminishes the efficiency of the United States Postal Service. Nor could any reasonable person explain why publishing Mr. Bollen's article creates an appearance of impropriety, while putting the same prose in a book does not create one.

2. *The Burden Placed On The Employee's Right Of Free Expression Is Severe.*

The burden placed on Mr. Bollen's First Amendment right of

free expression is clearly severe. The large fine and potential disciplinary action integral to the Reform Act chills Mr. Bollen's right to speak. He has stopped writing non-fiction articles because of the Act.

In order to sidestep this severe burden, the Government resorts to redrafting the Constitution. The Government contends that "[t]he ban does not prevent or punish speech of any kind; rather it bans only the receipt of payment for employee speech." U.S. Brief at 12. This definitional legerdemain is without basis. The United States argues in effect that the phrase "free expression" means expression without compensation, as opposed to expression without governmental interference.

Under the Government's unique reading of the First Amendment, expression is protected only if it is given away. Accordingly, it appears that the United States would argue that a law that bans sales of newspapers would be constitutional. Of course, few newspaper publishers would give their newspapers away for free and so such a law would effectively cripple the Fourth Estate.

The Government's attempt to bifurcate speech into paid and unpaid types not only creates absurd results, it also runs contrary to clear precedent. This Court has repeatedly held that "paid speech" merits as much First Amendment protection as does "unpaid speech." "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." Riley v. National Federation of the Blind, 487 U.S. 781, 801 (1988). See also New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (for First Amendment purposes, it is "immaterial . . . that newspapers and books are sold" rather than being given away for free); L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 892 (2d ed. 1988) (efforts to confine First Amendment protection to "pure expression" has and must fail "because the purveyor of ideas and information is likely to want both to convince others and to earn money . . . ."). It would be contrary to our entire democratic system to redraft the First Amendment to provide protection to only those who are so

rich that they do not care about being paid for their writing.

In Simon & Schuster, the Court struck down New York's "Son of Sam" law which required that the income criminals derived from describing their crimes be placed in escrow for the benefit of their victims. 112 S.Ct. at 508. Such a "financial burden operate[s] as [a] disincentive[] to speak" and therefore violates the First Amendment.[3] 112 S.Ct. at 504. If the United States prevails in this action, the result would be that literary murderers would have greater First Amendment protection than postal clerks.[4]

C. *The "Harm" Sought To Be Eradicated By The Ethics Reform Act Is Adequately Controlled By Existing Law.*

Ironically, the Reform Act, which imposes a severe restriction on the First Amendment rights of millions of honest, career government workers is unlikely to have any net positive benefits at all. The "harm" that the Government seeks to eradicate with respect to lower level executive branch employees is already

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[3]While the Government concedes that "removing a financial incentive to engage in expression does trigger First Amendment concern," it offers absolutely no support for the contention that "the character of the restriction in Section 501(b) [of the Reform Act] is far less onerous than a ban on expression, and the restriction consequently has less weight in the Pickering balance." U.S. Brief at 15.

[4]Another way to view the impact of an absolute ban on receiving compensation for writing articles is to analogize it to a 100% tax on such income. Since the honorarium ban only affects certain types of writing, it is as noted above, content-based. In Arkansas Writers Project, the Court held that a tax on certain magazines based on their content is a "discriminatory tax on the press" and that it "burdens rights protected by the First Amendment." 481 U.S. at 227. A fortiorari, the 100%, content-based "tax" of the Reform Act, burdens First Amendment rights.

adequately controlled by existing law. Putting aside the absurdity that a lower level executive branch employee such as a postal clerk would have either the power or the desire to exchange political favors for paid publication of non-fiction articles, such acts are crimes punishable by up to five years imprisonment and a $50,000 fine. 18 U.S.C. §§ 203, 216 (1993). More specifically, the Office of Personnel Management has prohibited certain activities that are "incompatible" with government service. 5 C.F.R. § 735.203(a) Note (1993). Such activities include "[a]cceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest . . . ." 5 C.F.R. § 735.203 (a)(1) Note (1993).

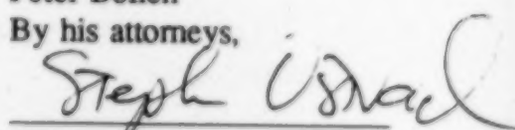
Thus, the only "benefit" that might result from the Reform Act is preventing the appearance of impropriety resulting from acts which do not create an appearance of a conflict of interest, such as Peter Bollen's book review of the Frederick Douglass biography. The government's interest in infringing on actions like Mr. Bollen's is neither "compelling," "substantial," or even serious, and such an interest warrants no protection at all.

CONCLUSION

For the reasons stated above, Amicus Peter Bollen respectfully requests this Court to affirm the decision of the Court of Appeals for the District of Columbia Circuit.

DATED: Boston, Massachusetts: July 27, 1994.

Respectfully submitted,
Peter Bollen
By his attorneys,



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APPENDIX OF *AMICUS CURIAE* PETER BOLLEN

The following affidavits were filed in the United States District Court for the District of Massachusetts in the case of Bollen v. United States, C.A. No. 90-13049.

AFFIDAVIT OF PETER BOLLEN

Peter Bollen, plaintiff in this action, states the following under the pains and penalties of perjury.

1. I have been employed as a clerk by the United States Postal Service since 1974. My current wage is $15.27 per hour. That is less than the amount specified for Grade 16 of the General Schedule.

2. During the past seven years I have written two books, "A Handbook of Great Labor Quotations" and "Nuclear Voices". I have received approximately $3500 to $4000 from the sales of those books.

3. During the past several years I have written articles which were printed in newspapers and magazines including North Shore Sunday and Sports Autographs. I have received approximately $225 to $300 for writing those articles.

4. At no time while employed as a federal employee have I ever been reprimanded or disciplined for my writing nor have I ever violated or been accused of violating the federal regulation banning compensation for speaking or writing on any subject that might present even an appearance of a conflict with my duties as a public employee.

5. A publisher has contacted me and indicated a willingness to pay me for the right to publish a new edition of my book, A Handbook of Great Labor Quotations. That publisher has offered to publish a revised and enlarged version of that book to which I

would add additional quotations and textual material or to publish instead simply an updated version containing new quotations. If the former is chosen, I would receive more than if only quotations were added.

6. I desire to continue writing articles for publication in newspapers and magazines. Based upon my experience in this field and my acquaintance with editors and publishers, I believe that, except for the application of the Act to me, I could write and sell at least four to eight articles during the remainder of 1991. Based on my experience in this field I believe that, except for the impact of the Ethics Reform Act, I would receive at least approximately $300 to $1000 from the sale of those articles in 1991.

7. I am currently writing a review of "Frederick Douglass" a recently published biography written by William McFeely. I expect to have finished that review by February 15, 1991. I believe it is very likely that I could sell that review to a newspaper or magazine published in this area because of Mr. Douglass' strong local connection to Lynn (he lived in Lynn for many years before the Civil War), because I have corresponded with Mr. McFeely which will add depth to my review and finally because I have already had other reviews published in the past. I anticipate submitting this review to, among others, the Lynn Sunday Post, which has previously published accounts of my work. The market value and timeliness of a review of Mr. McFeely's book are relatively high now, but based on my personal experience, I believe that value will drop precipitously as time passes for the following reasons. First, other reviews will be written and published. Second, the book will gradually cease to be "news." Finally, February is Black History Month when there is an increased market for writing about famous black Americans. Accordingly, the market value of the review will diminish irreparably with time. The longer the time that passes before I can sell that review the less I will be able to obtain for it and the possibility it will become unsalable will increase.

8. Furthermore, I wish to write an article about George Seldes, a 100 year old journalist who has covered every major war of the 20th Century and who has written over 20 books including "Witness to a Century." I believe that, in view of the current interest in media coverage of the war in the Persian Gulf, such an article would definitely be salable. However, based on my personal experience as a writer, I believe that to do a responsible job of writing such an article, I would have to travel to Vermont to interview Mr. Seldes, purchase several of his books, which are out of print, and incur substantial other research, travel and copying costs and expenses. In light of my limited personal resources these expenses would be significant to me and so I cannot and will not incur such expenses at this time unless I have at least the possibility of recouping them by selling this article. Thus, so long as the ban on "honoraria" remains in effect I am absolutely precluded from writing this article.

9. I have entered into a contract to write monthly articles for the Northeast News Service for $50 per month plus expenses beginning in December of 1990. Unless I am assured that performance of that contract is legally permitted I may have to breach the contract since I cannot afford to suffer a $10,000 civil fine.

10. I expect to be appointed acting editor of the Northeast News Service shortly. As acting editor, I would receive a salary for my duties which would include writing articles, editing articles written by others and performing other managerial duties. Unless assured I can legally assume that position I may have to refuse it.

11. On February 6, 1991, while at my duty station in Lynnfield, I received a copy of the attached January 30, 1991, letter relating to the Ethics Reform Act's ban on receipt of honoraria by federal employees.

Sworn to under the pains and penalties of perjury.

Dated: 2/12/91

/s/
Peter Bollen

SUPPLEMENTAL AFFIDAVIT OF PETER BOLLEN

Peter Bollen, plaintiff in this action, states the following under the pains and penalties of perjury.

1. Since the Ethics Reform Act of 1989 took effect on January 1, 1991, I have reduced the amount of time I have spent researching, writing and editing articles on non-fiction topics. So long as the ban on receipt of honoraria for articles remains in effect I will necessarily have to continue to restrict my writing.

2. Because my income from the Postal Service has always been relatively modest, I have always tried to use my spare time to earn a small supplementary income. My personal preference has been and continues to be to try to earn that income by writing non-fiction books and articles for sale. Writing non-fiction articles has enabled me to express my opinions and beliefs on a variety of topics which I believe are of public importance and interest and about which I believe I have something unique to say.

3. However, so long as I cannot receive income from selling non-fiction articles, I will have to turn a portion of my efforts to other, more profitable activities. I may try to write fiction or other "governmental-approved" forms of writing or I will try to earn money from other "government-approved" occupations that do not involve speaking or writing on non-fictional matters. Consequently, for so long as the ban on honoraria remains in effect, there will be non-fiction articles that I will not write solely because of the financial impact of the ban on me.

Sworn to under the pains and penalties of perjury.

Dated: 3/29/91

/s/
Peter Bollen